No. 90-38

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS ..... *Petitioners*

vs.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; DONALD VENHAUS, COUNTY JUDGE, PULASKI COUNTY, ARKANSAS; PATRICIA TEDFORD, TREASURER, PULASKI COUNTY, ARKANSAS; PULASKI COUNTY, ARKANSAS; JOANN BOONE, TREASURER, CITY OF BENTON, ARKANSAS; THE CITY OF BENTON, ARKANSAS; AND ALL OTHER SIMILARLY SITUATED COUNTIES AND CITIES ..... *Respondents*

CITY OF FAYETTEVILLE, ARKANSAS ..... *Intervenor*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CITY OF FAYETTEVILLE, ARKANSAS ..... *Intervenor*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The Petitioners have stated that a conflict exists between the decision of the Supreme Court of Arkansas in this case and decisions of other state and federal appellate courts regarding the First Amendment standards to be applied to cable television, and that the decision of the Arkansas court is erroneous. This conclusion is based upon a very broad reading of cases issued by this Court and by other federal court decisions. Arkansas' differing sales tax treatment of the print and cable media is justified by important or substantial interests, not the least of which are increasing revenues for the education of Arkansas' children and to meet the needs of the state's citizenry. Further, the fact that Arkansas has no compensating use tax upon the service of descrambling satellite television signals is also not helpful to Petitioners' First Amendment position because the compensating tax statutes do not apply to any services.

The Petitioners have also alleged that Act 769 of 1989 violates their rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. This legislation, when viewed under the "rational basis" test, survives this constitutional challenge. Therefore, there is adequate delineation of the First Amendment rights of cable television, and Petitioners' Petition should be denied.

REASONS FOR DENYING THE WRIT

I.

FIRST AMENDMENT CONSIDERATIONS

The Petitioners have stated that there is a real conflict between the Supreme Court of Arkansas' application of the First Amendment test enunciated by this Court in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenues*, 460 U. S. 575, 75. L.Ed.2d 295, 103 S.Ct. 1365 (1983) and *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 95 L.Ed.2d 209, 107 S.Ct. 1722 (1987), and similar decisions by other state and federal appellate courts. In *Minneapolis Star*, this Court repeatedly emphasized that the case dealt with the press, and struck down the tax at issue there because it singled out the press, and because it targeted a small group of newspapers. This Court stated:

> "When the state singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." (75 L.Ed.2d at 304-305)

Similarly, in *Arkansas Writer's Project*, this Court held that because the tax in question targeted only a small group "within the press" and, more repugnantly, was imposed on the basis of a publication's content, the tax must be declared invalid. Both of these cases, as well as *Louisiana Life, Ltd. v. McNamara*, 504 S.2d 900 (La. App. 1st Div., 1987), cited by

Petitioners at page 14 of their Petition, turned on the fact that a tax which "singles out the press" violates the right of freedom of the press guaranteed by the First Amendment. Cable television is not a part of the press which *Minneapolis Star*'s historical narrative emphasized as being worthy of the highest degree of protection. Cable television is entitled to a degree of free speech protection under the First Amendment, but it has not historically been accorded the heightened degree given to the press, the collective body of printed publications.

Even if it were established that cable television was entitled to the same degree of protection as the press, the tax at issue in the present case withstands constitutional challenge. There is no "singling out" of cable television. Ark. Code Ann. § 26-52-301(3)(D)(i) (Supp. 1989), cited by Petitioners at pages 24a and 25a of their Petition, imposes sales tax on cable television service as a part of the state's general scheme of sales tax imposition. Cable television is one of many services and products subject to the state's general tax levied upon the gross receipts derived from sales of those services and products. The same general sales tax is applied to sales of utilities services, books and magazines sold at retail, admissions to movie theaters, sales and rentals of videotaped movies and documentaries, and many other products and services. No special tax is involved; cable television is not "singled out"; and no group of cable service providers is targeted any differently than another. The tax applies evenly to all cable television service. Moreover, it is not even argued by Petitioners that the infirmity so apparent in *Arkansas Writer's Project* is present in the case at bar. Content-based discrimination, which has been deemed so offensive to the First Amendment, is not an issue in the present case.

U.S. v. O'Brien, 391 U.S. 367, 20 L.Ed.2d 672 (1968), cited by Petitioners at page 16 of their Brief, clearly held that governmental regulation is justified under First Amendment review if:

> (1) The regulation is within the constitutional power of the government;
>
> (2) The regulation furthers an important or substantial interest;
>
> (3) The regulation is unrelated to suppression of free expression; and
>
> (4) Any incidental restriction of First Amendment freedoms is no greater than necessary to further the governmental interest. (20 L.Ed.2d at 680).

The same standard was applied in *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N. D. Cal. 1987), and *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9 (D. C. Cir. 1977), two other cases cited by Petitioners. Does the sales tax on cable television service pass the *O'Brien* test? The answer is clearly yes. The placement of cable television service within the general sales tax base goes no further than necessary to advance the "important or substantial interest" of raising revenue to provide for the education of Arkansas' children and to meet the needs of its citizens. The Supreme Court of Arkansas in this case determined that for tax purposes sales of "scrambled" satellite television broadcast subscription services and sales of cable television service should be treated similarly. Although this Respondent has challenged this finding (*Pledger v. Medlock et al.* Supreme Court of the United States, docket number 90-29), the General Assembly

of the State of Arkansas chose to provide equal tax treatment of those services. This treatment is provided in Act 769 of 1989, which Petitioners cite at pages 24a and 25a of their Petition (Appendix E). The Emergency Clause of this Act states:

> "It is hereby found and determined by the General Assembly that the State of Arkansas is in serious need of additional revenue for the purpose of funding critical education programs and other essential services required by the citizens of the state and the provisions of this act are necessary to raise needed revenue. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect on and after July 1, 1989."

Petitioners contend that the raising of revenue is not an interest which will satisfy the *O'Brien* test. Petitioners' formula would require tht a compelling interest be exhibited by the government. The showing of a compelling interest is not required in this case. *O'Brien* expressly states that a governmental regulation must further an "important or substantial interest." Petitioners' chief authority, *Minneapolis Star*, recognized that raising of revenue is an "interest [which] is critical to any government." 460 U.S. at 586. Surely an interest which is "critical" meets the criterion of "important or substantial." The Court in *Minneapolis Star* acknowledged the importance of such interest; it simply determined that even such an important interest could not support a special tax on ink and paper which was levied against only one newspaper. Likewise, the Court in *Arkansas Writer's Project* stated:

> "The Commissioner . . . asserts the state's general

> interest in raising revenue. While we have recognized that this interest is an important one, . . . it does not explain selective imposition of the sales tax on some magazines and not others, based solely on their content. (107 S.Ct. at 1722)

In the present case there is no selective imposition of sales tax on some cable television systems and not others. There is certainly no selective imposition based on content of programming. Therefore, the recognized important interest of raising revenue is sufficient, and the *O'Brien* test is fully satisfied.

As stated by the Supreme Court of Arkansas in *Streight v. Ragland* 280 Ark. 206, 655 S.W.2d 459 (1983), all legislative enactments are presumed to be constitutionally valid. The legislature has broad discretion in creating classifications for taxation purposes. *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F. 2d 711 (8th Cir. 1986); *Times Mirror Co. v. City of Los Angeles*, 237 Cal. Rptr. 346 (1987). The court in the *Times Mirror* case also stated that a tax which is neither special nor unique is a valid legislative enactment even though it incidentally impacts upon First Amendment activities. Finally, that Court recognized the power of the legislature to enact taxes "in order to generate revenue so long as those laws operate evenhandedly upon all similarly situated." 237 Cal. Rptr. at 351. The *Times Mirror* Court specifically determined that its decision was consistent with *Minneapolis Star, Arkansas Writer's Project*, and *City of Alameda v. Premier Communications Network, Inc.*, 202 Cal. Rptr. 684 (Cal. App. 1984), all cases relied upon by Petitioners.

Cable television is not "similarly situated" when compared to any other medium. Its use of and impact upon

public ways distinguishes it from all broadcast and print media, and its enjoyment of virtually unlimited access to households puts it in a different class than the press. *Omega Satellite Products v. City of Indianapolis, Inc.*, 694 F.2d 119 (7th Cir. 1982). Cable television simply cannot be equated with any other entity for purposes of the "similarly situated" formula. It has a very real impact upon public ways and is of a character completely dissimilar to the press. Further, although this Respondent disagrees with the finding of the Supreme Court of Arkansas that the service of descrambling satellite television signals is similarly situated to cable television service, the Arkansas General Assembly in enacting Act 769 of 1989 corrected the only alleged defect found by the court to exist.

Both the Supreme Court of Oklahoma, in the case of *Oklahoma Broadcasters Association v. Oklahoma Tax Commission*, 789 p. 2d 1312 (Okla. 1990), and the intermediate New York appellate court, in the case of *McGraw-Hill, Inc. v. State Tax Commission* (App. Div. 3 Sept., 1989), affirmed and adopted, 252 N.E.2d 163 (N.Y., 1990), in dismissing the important distinction between cable television and the other media, have gone too far in attempting to construe *Minneapolis Star* and other above-cited cases to read in favor of Petitioners' position.

Another portion of Petitioners' First Amendment argument addresses the fact that Act 769 of 1989 did not amend the Arkansas Compensating Tax Act (cited by Petitioners at Appendix F, page 26a) to impose the tax on the service of descrambling satellite television signals. The Arkansas compensating tax is levied on the privilege of storing, using, distributing, or consuming within the state any article of tangible personal property purchased for storage, use, distribution, or consumption in the state. The

problem with this part of Petitioners' argument is that the compensating tax, unlike the gross receipts (sales) tax, was not previously levied on the sale of cable television service. The very nature of the gross receipts tax makes it applicable only to transactions between a buyer and seller within the State of Arkansas. By definition, the compensating tax was and is not applicable to *any* service. Therefore, the Petitioners' argument in this regard is without merit.

II.

FOURTEENTH AMENDMENT CONSIDERATIONS

The Petitioners have also alleged that Act 769 of 1989 violates their rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. In *Streight v. Ragland,* 655 S.W.2d 459, it was determined by the Supreme Court of Arkansas that state tax legislation should be reviewed under the "rational basis" test. The parties who attacked the tax legislation in *Streight* urged the Arkansas Supreme Court to abandon the rational basis test. In refusing such position the Court held:

> "Under the rationality standard of review, we must presume the legislation is constitutional, i.e. that it is rationally related to achieving a legitimate governmental objective. This presumption we indulge locates the burden of proof. It imposes upon the party against whom it is directed the burden of proving the unconstitutionality of the legislation, i.e. that the act is not rationally related to achieving any legitimate objective of state government under any reasonably conceivable state of facts . . . All tax measures usually involve some discrimination, . . . but these discriminations are not constitutionally impermissible as long as

> they are not arbitrary and are supported by a rational and legitimate basis . . . It is simply impermissible for us to evaluate the wisdom of legislation." (655 S.W.2d at 463-465)

The same facts which render cable television completely dissimilar to all other media provide more than sufficient support for subjecting sales of cable television service to the general sales tax. Cable's use of public ways and disruption of public order place it in a different class for both First Amendment and equal protection considerations. As stated by the very cases upon which Petitioners so heavily rely, *Minneapolis Star* and *Arkansas Writer's Project*, the governmental objective of raising revenue is important, indeed critical. An objective which is so described is obviously one which is legitimate. Therefore, the tax legislation at issue in the present case meets and surpasses the requirements of the rational basis test set forth in *Streight v. Ragland.*

No fundamental guarantee has been significantly diminished or curtailed by the tax legislation challenged by Petitioners. As a result, equal protection analysis requires no more than the application of the rational basis standard. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 49 L.Ed.2d 520, 96 S.Ct. 2562 (1976); *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 36 L.Ed.2d 16, 93 S.Ct. 1278 (1973).

As held in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 3 L.Ed.2d 480, 79 S.Ct. 437 (1959):

> "The States have a very wide discretion in the laying of their taxes . . . The state may impose different specific taxes upon different trades and professions and may

> vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government." (358 U.S. at 526, 527)

Allied Stores made it clear that tax legislation is presumed to be rationally related to a legitimate governmental objective. The great deference given to a legislature in its exercise of discretion as to the levying of taxes is justified because it is the legislature which must determine which taxes are economically sound in order to raise revenue. If the legislature determines that collection of a tax would be unreliable or burdensome to the government as applied to a particular transaction, it may choose to exempt that transaciton in order to prevent economic waste. As stated by this Court in *Madden v. Kentucky*, 309 U.S. 83 (1940):

> "Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden." (309 U.S. at 88)

Imposition of the general sales tax upon sales of cable television service does not significantly burden any rights of Petitioners. Without significant diminishing or curtailment of a fundamental right, there can be no infringement of such right. *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, a case relied upon as authority by Petitioners, acknowledged:

> ". . . rules restricting speech do not necessarily abridge freedom of speech . . . Restriction becomes abridgement only when government seeks to limit speech

> because it is on one side of the issue rather than another, . . . or because it is thought unwise, unfair, false, or dangerous." (567 F.2d at 46, 47)

No First Amendment protection having been infringed, Petitioners cannot make some higher degree of scrutiny applicable to the present case. The presumption of rationality which attaches to all tax legislation cannot be overcome unless a challenger, such as Petitioners herein, proves that no conceivable rational objective could support the legislation. *Streight v. Ragland*, 655 S.W.2d 459. Appellants have not and cannot meet that burden of proof, and no infringement of any fundamental right has been proven by Petitioners.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioners' Petition for Writ of Certiorari filed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William E. Keadle, hereby certify that I have served true and correct copies of the above and foregoing Brief as provided by Supreme Court Rules 29.3 and 29.5(b) to each of the following, by U.S. Mail, postage prepaid, addressed as follows:

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